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UMA SUNDARI MUTHUSAMY

v.

KANNIAPPAN THIRUVENGADAM

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HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[ORIGINATING SUMMONS NO: 25-43-2005]
15 MAY 2009

C ***FAMILY LAW:*** *Divorce - Division of matrimonial assets - Variation of consent order - Principles applicable - Law Reform (Marriage and Divorce) Act 1976, ss. 76(1), (3)*

D ***FAMILY LAW:*** *Divorce - Maintenance - Variation of consent order - Principles applicable - Law Reform (Marriage and Divorce) Act 1976, ss. 80, 83, 84*

FAMILY LAW: *Matrimonial property - Division of assets - Variation of consent order - Principles applicable - Law Reform (Marriage and Divorce) Act 1976, ss. 76(1), (3)*

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FAMILY LAW: *Children - Maintenance - Whether there was a legal obligation to provide maintenance for issue of marriage well past 18 years of age - Principles applicable*

F The petitioner and respondent were married but they subsequently separated and eventually filed for divorce. The *decree nisi* (first order) provided, *inter alia*, that custody and care of the issue of the marriage, one K. Vasanth, be given to the petitioner with reasonable access to the respondent, and that the petitioner shall have no claim to the respondent's first, second and third properties. The second order was in respect of the maintenance sum payable to the petitioner, but it was superseded by the third order in which the parties agreed that a lump sum payment of RM20,000 to the petitioner and RM10,000 to K. Vasanth by the respondent would constitute final settlement of the petitioner's claim and she would thereafter have no further claim against the respondent. The petitioner, in the present action, sought to vary the orders pertaining to the respondent's properties – including two other properties (fourth and fifth properties), which the petitioner claimed the respondent did not disclose at the time the first order was recorded – and the maintenance sum.

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Held (dismissing the application with costs):

(1) It was not disputed that the first order was drawn up by consent and that the petitioner made no claims whatsoever over the division of the first, second and third properties at the time the *decree nisi* was granted and later made absolute. By virtue of s. 76(1) and (3) of the Law Reform (Marriage and Divorce) Act 1976 ('Act'), the petitioner's claim for the three properties came too late in the day and had no basis in law. Therefore, this part of the petitioner's claim ought to be dismissed. *Manokeran Subramaniam v. Ranjit Kaur Nata Singh* (foll). (paras 8, 9 & 10)

(2) The respondent acquired the fourth and fifth properties long after he and the petitioner had separated, and more than a year after he had filed the divorce petition. As such, the petitioner, by any stretch of the imagination, could not have contributed to the acquisition of the said properties; there was no evidence that she had indeed contributed in one way or another, apart from claiming that she cared for the issue of the marriage. They were thus not matrimonial assets within the meaning of s. 76(1) of the Act. The petitioner could also not stake her claim by virtue of s. 76(3) of the Act since she had long ago abandoned the matrimonial home at the material time the two properties were acquired. In such event and taking into account that the two properties were acquired after the filing of divorce proceedings by the respondent, it could not have been the respondent's intention to acquire the two properties to be a continuing resource for the family or to be utilised for the benefit of their family as a whole. Hence, the fourth and fifth properties were not matrimonial assets with the definition of the law and the petitioner's claim for the division of the two properties should also be disallowed. *Chung Seng Woah v. Lim Shook Lin* (foll). (paras 11, 12 & 13)

(3) The petitioner consented to the terms of the third order and was fully aware of what the order meant and its effects thereafter. Additionally, she was at all times represented and advised by an experienced solicitor before the terms of the third order were formalized. In that case, s. 80 of the Act, which obviously covered the third order, must operate in favour of the respondent, thereby conferring a good defence to any further claims for future maintenance thereafter. The petitioner must also fulfil the requirements of ss. 83 and 84 of

A the Act before the court could grant the variation of the maintenance sum she was seeking. However, she did not plead any misrepresentation or mistake of fact. Equally, there was no evidence that either party was under any mistake of fact or had engaged in any sort of misrepresentation before or at the B time the third order was recorded. What was left was for the petitioner to show that there had been a material change in the circumstances, which on the facts of this case, she failed to do. (paras 15, 16 & 17)

C **(4)** With regard to K. Vasanth who was now 22 years old, the respondent was no longer under any legal obligation, irrespective of whether K. Vasanth was still pursuing his education beyond that age, to provide for his maintenance and sustenance since he was well past 18 years of age. Even if it D were only correct and proper to prolong the respondent's duty to provide maintenance on the ground that K. Vasanth was still pursuing his formal education in any institute of higher learning, the petitioner failed to provide any evidence to prove just that. The least the petitioner could have done was E to show a letter of admission, receipts of the fees chargeable and paid or K. Vasanth's student card. But this was not done. Therefore, there was no basis for the court to grant the maintenance sum sought to cover K. Vasanth's educational needs. *Karunairajah Rasiah v. Punithambigal Poniah* (foll). (paras F 19, 20 & 21)

(5) The marital bliss lasted only for about 1 1/2 years. As such, the one lump sum payment of RM20,000 paid by the respondent to the petitioner was more than enough to cover her needs. It should be sufficient for the petitioner to adjust G herself to her financial situation post-divorce. It augers well with the trend of the clean break principle advocated by the courts in recent years, particularly in instances where the marriage is short-lived. (para 22)

H **Case(s) referred to:**

Chew Ling Hang v. Aw Ngiong Hwa [1997] 4 CLJ 448 CA ***(refd)***

Ching Seng Woah v. Lim Shook Lin [1997] 1 CLJ 375 CA ***(foll)***

Karunairajah Rasiah v. Punithambigai Poniah [2004] 2 CLJ 365 FC ***(foll)***

Manokaram Subramaniam v. Ranjid Kaur Nata Singh [2008] 6 CLJ 209 FC ***(foll)*** I

Minton v. Minton [1979] 1 All ER 79 ***(refd)***

V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie [1999] 5 CLJ 474 HC ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 76(1), (3), 80, 83, 84, 92, 95

For the appellant - R Kandiah; M/s Mohd Latip & Assoc
For the respondent - KH Tan; M/s KH Tan & Co

Reported by Suresh Nathan

JUDGMENT

Ahmadi Asnawi JC:

[1] Both the petitioner and the respondent were married on 29 August 1985. Subsequently the following events took place:

(1) Mac 1987	–	Matrimony broke down. Both parties led separate lives.
(2) 6 January 1991	–	The respondent filed Divorce Petition No. 33-2-1991
(3) 6 December 1992	–	*Decree Nisi* was granted.
(4) 24 December 1992	–	*Decree Nisi* was made absolute.

The *decree nisi* (referred to as the first order) provides *inter alia*:

(a) The dissolution of the marriage between petitioner and respondent.

(b) Custody, care and control of an issue of the marriage one K. Vasanth a/l T. Kanniappan was given to the petitioner with reasonable access to the respondent.

(c) Respondent was ordered to pay arrears of maintenance of the said child amounting to RM7,800 being arrears from 1 January 1991 to 31 December 1992 at RM300 per month and thereafter to pay RM300 per month for the maintenance of the said child.

(d) That the petitioner shall have no claim of the respondent's immovable properties as follows:

A (i) A piece of land known as PTD 658, HS (M) 1642 in Mukim Chaah Johor with a house erected thereon which is subject to a mortgage to Pacific Bank Bhd (hereinafter known as first property).

B (ii) A piece of land together with a single storey terrace house erected thereon held under grant No. 10371, Lot 1202, Mukim of Kota Tinggi subject to a mortgage to Deutsche Bank (hereinafter known as second property).

C (iii) A piece of land, about 2 E. OR. 00P held under PTD 667 HS(M) 87 Mukim Ulu Sungai Sedili Besar, Kota Tinggi (hereinafter referred to as third property).

(5) 21 July 1999 – Petitioner filed Saman Pemula 24(L)-425-1999 against the respondent

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(6) 30 September 2000 – Consent orders (referred to as second order) relating to Saman Pemula 24(L)-425-1999 was recorded by both parties. This second order provides *inter alia* that:

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(i) the respondent is to pay RM500 per month for the maintenance of the said child K. Vasanth a/l T. Kanniappan and also RM500 per month to the petitioner as the petitioner's maintenance.

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(ii) the respondent agrees to continue paying RM500 as maintenance to K. Vasanth a/l T. Kanniappan until he is 24 years old in the event he enrolled in any institute of higher learning and to pay 1/2 of the annual tuition fees.

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(7) 5 July 2001 – the petitioner filed saman penghutang penghakiman against the respondent *vide* the same saman pemula.

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(8) 6 March 2002 – a consent order (hereinafter referred to as the third order) was recorded by both parties in respect of the said saman penghutang penghakiman. This consent order provides *inter alia* – in its original form:

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(a) Bahawa responden dikehendaki membayar kepada pempetisyen wang pukal (lump sum payment) sebanyak RM20,000 sebagai penyelesaian muktamad tuntutan pempetisyen untuk segala tuntutan bayaran nafkahnya yang tertunggak sebelum perintah ini dan juga untuk nafkah untuk masa akan datang dan dengan bayaran RM20,000 tersebut pempetisyen tidak mempunyai apa-apa tuntutan lagi terhadap responden.

(b) Bahawa responden dikehendaki membayar kepada anaknya bernama K. Vasanth a/l T. Kanniapan wang pukal (lump sum payment) sebanyak RM10,000 (melalui pempetisyen) sebagai penyelesaian muktamad tuntutan K. Vasanth a/l T. Kanniappan untuk segala tuntutan bayaran nafkah yang tertunggak sebelum perintah ini dan juga untuk nafkah untuk masa akan datang dan dengan bayaran RM10,000 tersebut pempetisyen tidak mempunyai apa-apa tuntutan lagi terhadap responden.

[2] It is clear beyond doubt that this third order superceded the first and second order in respect of the maintenance sum payable to the petitioner.

(9) 9 September 2005 – the petitioner filed the present Usul Pemula No. 24-42-2005 against the respondent

[3] By this usul pemula the petitioner applied to vary the first order (*decree nisi* dated 6 December 1992) and claimed 50% of the following immovable properties:

(i) the first property

(ii) the second property

(iii) the third property

(iv) one unit shoplot held under PTD 2114, HS (D) 13311 Mukim Kota Tinggi where a sum of RM42,000.00 was paid as deposit on 29 April 1992 (hereinafter referred to as fourth property).

(v) one unit of double storey terrace shoplot/office at lot 2408, Mukim of Kota Tinggi purchased at sum of RM245,000 and of which the sale and purchase agreement was executed on 11 July 1992 (hereinafter referred to as fifth property).

[4] The petitioner claimed that the respondent did not make full disclosure of these fourth and fifth properties at the time the first order was recorded.

[5] The plaintiff is also seeking to vary the second order whereby the respondent is to pay:

(i) the petitioner arrears of maintenance of RM500 per month from 1 October 2000 up to 1 September 2005, amounting to RM29,500.

(ii) the petitioner RM3,000 per month as maintenance for life from the date of the new order and all medical expenses incurred by the petitioner thereafter.

(iii) K. Vasanth a/l T. Kanniappan arrears of maintenance at RM500 per month from 1 October 2000 to 1 September 2005, amounting to RM29,500.

(iv) K. Vasanth a/l T. Kanniappan RM3,000 per month as maintenance effective from date of the new order until he is 24 years and if the said K. Vasanth is studying in any institution of higher learning.

(v) the 3rd item of the second order is to remained.

[6] The petitioner is also seeking to vary the third order to the following effect:

(i) the petitioner is to return the lump sum payment of RM20,000 paid to her by the respondent as full and final settlement of the petitioner's claim for maintenance.

(ii) the respondent to pay the petitioner RM3,000 per month as monthly maintenance for life effective from date of new order and all her medical expenses as in the variation prayed for to vary the second order enumerated earlier.

(iii) the respondent to pay K. Vasanth RM3,000 per month as monthly maintenance until he reaches the age of 24, effective from the date of new order as in the variation prayed for to vary the second order enumerated earlier.

[7] The petitioner now says that she is now unemployed and incapable of engaging in any sort of employment on account of her ill health, having suffered from various kinds of diseases. She could not even afford to pay for her medical expenses and also to support the up keep and educational expenses of her son. She had to rely on the goodwill of her siblings and relatives to survive.

Division Of First, Second And Third Property

[8] It is not disputed that the first order *(decree nisi)* was drawn up by consent. It is also not disputed that the petitioner made no claims whatsoever over the division of the first, second and third properties at the time the *decree nisi* was granted and later made absolute. Paragraph 4 of the said order is clear and plain enough.

[9] It is trite that the claims presently made by the petitioner are governed by the provisions of s. 76(1) and (3) of the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as "the Act"). The wording in these subsections is equally plain and clear. The Federal Court in *Manokaram Subramaniam v. Ranjid Kaur Nata Singh* [2008] 6 CLJ 209 thus explained the extent of the court's jurisdiction under the said s. 76(1) and (3) as follows per Ariffin Zakaria FCJ (as his Lordship then was):

> Reverting to the issue before us, I am of the view that under s. 76(1) and (3) of the Act, the court's jurisdiction to order division of matrimonial asset is limited to the time when granting a decree of divorce or judicial separation and not at a later stage. As the present application was made subsequent to the decree absolute, therefore, I hold that the court has no jurisdiction to grant such order.

[10] The petitioner's claim for the said three properties fell on all fours with the said ruling. It came too late in the day. It has no basis in law. Therefore, I have no hesitation in dismissing this part of the petitioner's claim.

Division Of Fourth And Fifth Properties

[11] It is not disputed that the parties were separated and led separate lives from Mac 1987. They were married on 28 August 1985. Apparently they were together for only about 1 1/2 years. The respondent filed Divorce Petition No. 33-2-1992 on 6 January 1991, about five years after their separation. It is not disputed that the respondent acquired the fourth property on

29 April 1992 and the fifth property on 11 July 1992, long after their separation and more than a year after Divorce Petition No. 33-2-1992 was filed by the respondent.

[12] In such event, the petitioner, by any stretch of the imagination could not have contributed to the acquisition of the said properties and there is no evidence that she had indeed contributed to the acquisition of the said properties in one way or another, apart from claiming that she cared for the issue of the marriage. It is thus not matrimonial assets within the meaning of s. 76(1) of the Act. The petitioner could not also staked her claim by virtue of s. 76(3) of the same as at the material time the two properties were acquired, she had long ago abandoned the matrimonial home. In such event and taking into account that the two properties were acquired after the filing of the divorce proceedings by the respondent, it could not have been the intention of the respondent to acquire the said two properties to be the continuing resources of the family or to be utilized for the benefit of both the parties including their child or their family as a whole. As noted by the Court of Appeal in *Ching Seng Woah v. Lim Shook Lin* [1997] 1 CLJ 375:

> During the subsistence of a marriage the expression "matrimonial assets" refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole.

[13] It is thus my ruling that the fourth and fifth properties are not matrimonial assets within the definition of the law. Hence, the petitioner's claim for the division of the said two properties is also disallowed.

Variation Of Maintenance Sum

[14] As reiterated earlier, the third order superceded the second order. In the third order the parties herein agreed that the lump sum payment of RM20,000 paid to the petitioner and RM10,000 to K. Vasanth a/l T. Kanniappan by the respondent shall constitute the final settlement of the petitioner's claim and thereafter the petitioner shall have no further claim against the respondent.

[15] It is not disputed that the petitioner consented to the terms of this third order. It is also not diputed that she was fully aware of what the order means and its full terms and effects thereafter. In exh. KT7, exhibited by the respondent in his affidavit in reply, the petitioner admitted that "I also understand that by accepting this offer of settlement by Dr Kanniappan, I can make no further claims against Dr Kanniappan, nor can I enforce the order of court dated 30 September 2000". Additionally the petitioner was at all times represented and advised by an experienced solicitor before the terms of the third order were formalized and entered. In such event I have no difficulty in accepting the submission that s. 80 of the Act must operate in favour of the respondent, thereby conferring a good defence to the respondent to any further claims for future maintenance thereafter. The third order is obviously covered by the terms of s. 80 of the Act.

[16] The petitioner must also fulfill the requirements of s. 83 and 84 of the Act before the court could grant the variation of the maintenance sum she is now seeking. However no misrepresentation or mistake of fact was pleaded by her. Equally, there is no evidence that either party was under any mistake of fact or had engaged in any sort of misrepresentation before or at the time the third order was entered or recorded. What is left is for the petitioner to show that there has been any material change in the circumstances.

[17] Here, on the affidavit evidence I am satisfied that the petitioner had also failed to show that there has been any material change in the circumstances. Her averment that she is now unemployed is not new. She was dismissed from her employment as a bank employee in 1998 before the third order was entered. She claimed that she could not afford to pay her medical bills but opted to seek treatment at a private specialist centre way up in Shah Alam when Muar General Hospital is also designated as Hospital Pakar.

[18] She also pleaded that the respondent is the majority shareholder in Syarikat K.T Steel. But this has been the case before the third order was entered. The respondent has also shown that there has been no change in his earnings for the years 2000 to 2005 as can be seen in the Notis Taksiran Cukai Pendapatan exhibited by the respondent. The respondent has also stated that Syarikat K.T Steel had ceased operation a long time

ago and has since not produced any products. This averment has not been rebutted by the petitioner. The petitioner is now the administrator of her late father's estate. The estate is worth RM310,326.75 while its liabilities amounted to RM11,500. She did not also disclose the number of the beneficiaries equally entitled to the estate though she contended that the estate is to be distributed among its beneficiaries. Equally, the petition failed to disclose her income from the money lending business she managed. Her claim for monthly expenses amounting to more than RM3,000 a month is also not supported by documentary evidence.

[19] As regards to K. Vasanth, he is now 22 years old. The duty of the respondent to provide for his maintenance is governed by s. 92 of the Act. Section 95 provides for the duration to maintain that duty. It ceases upon the child reaching the age of 18 years irrespective of whether the said child is still pursuing his education beyond that age save for mental or physical disability afflicting the child. Thus the Federal Court in *Karunairajah Rasiah v. Punithambigai Poniah* [2004] 2 CLJ 365, at held No. 2 expounded the section upon the following terms:

Held:

(2) The words "disability" in s. 95 of the 1976 Act covers only "physical" and "mental" disability. It cannot cover financial dependence. There is no legal basis for interpreting the exceptions in s. 95 to include financial dependence for the purpose of pursuing tertiary education after the child attains the age of 18. The only basis for such an interpretation that goes against the clear words of the law is on a moral basis. However, moral grounds can never override clear provisions of the law in deciding a case. The function of the judge is to apply the law, whatever his personal view about the lay may be.

(3) The Islamic Family Law (Federal Territories) Act 1984 is more advanced than its civil counterpart. Section 79 thereof specifically provides that the court is empowered to make a maintenance order beyond the child's age of 18 "to cover such further period as it thinks reasonable, to enable the child to pursue further or higher education or training." Such words cannot be interpreted into the existing provisions of s. 95 of the 1976 Act. There has to be a specific provision to that effect which is a matter for Parliament to address. This case had to be decided according to the law as it now stood.

[20] As the said K. Vasanth a/l T. Kanniappan is well past 18 years of age, clearly the law is not on his side. The respondent is no longer under any legal obligation to provide for his maintenance and sustenance.

[21] Even if it is only correct and proper to prolong the respondent's duty to provide maintenance on grounds that the said K. Vasanth a/l T. Kanniappan is still pursuing his formal education in any institute of higher learning, the petitioner however failed to provide any evidence to show just that. There is no evidence to show that K. Vasanth a/l T. Kanniappan is still pursuing his education at any institute of higher learning. The least the petitioner could have done is to show the letter of admission or the receipts of the fees chargeable and paid or K. Vasanth's student card. But this was not done. Therefore there is no basis for the court to grant such maintenance sum to cover K. Vasanth's educational needs.

[22] The marital bliss lasted only for about 1 1/2 years. In such event, in my view the one lump sum payment of RM20,000 paid by the respondent to the petitioner is more than enough to cover the petitioner's needs. It should be sufficient for the petitioner to adjust herself to her financial situation post divorce. It augers well with the trend of the clean break principle advocated by our courts in recent years in particular where the marriage is short-lived – see *V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474; *Chew Ling Hang v. Aw Ngiong Hwa* [1997] 4 CLJ 448; *Minton v. Minton* [1979] 1 All ER 79.

[23] For all the reasons given, the petitioner's application is dismissed with costs.